THE COURT: Wardrip versus Thaler.

Ms. Hayes.

MS. HAYES: May it please the Court. The Texas Court of Criminal Appeals was well within the bounds of AEDPA reasonableness in ruling that the -- that Wardrip had failed to establish the merits of his ineffective assistance claim. In state court the allegation was that counsel failed to put on any evidence of his positive prison record, but there was no evidence actually offered to the state court to support the claim. Instead, there were only unsupported allegations in the state writ, for example, claiming that Wardrip had trained on the fire department. That he was a reporter for the unit newspaper. That he went to a college class and was a trustee and maybe didn't even live within the prison walls when he was last in prison serving a 35-year sentence for the murder of his fifth victim. There was also an allegation that he ran a fundraiser for a child that needed a kidney and liver transplant. And maybe an unidentified warden told his father that he was one of the best prisoners there. But in state court, like I said, there was no evidence to back any of these allegations up.

There was no affidavit from any uncalled witness. There was no TDCJ guard or warden or anyone

with knowledge about TDCJ that was presented during state habeas. There was also no affidavit from Wardrip attesting to his, at least informing counsel these are the -- look what I did in prison, I helped with a fundraiser. I was a trustee. Some of the allegations are not obviously something that would readily jump out from TDCJ records. For example, the prison fundraiser allegation isn't something that may even appear in the records. In fact, to date, there's still been no evidence offered, other than in federal court. The inmate trust account records establishing that perhaps his only participation was contributing, maybe, $1.90 to a fundraiser.

Although that was granted, that was in federal court. But that's the only evidence to date that's come up to even show what kind of participation he may have had. So when Wardrip faulted counsel for not investigating and presenting mitigating evidence, I mean, he failed to provide that evidence to the state court to even consider. And without the affidavits or the record evidence, Wardrip claim would fail to demonstrate there were any real deficiencies with the trial counsels investigation.

THE COURT: The affidavit from John Curry that was introduced in state habeas was that provided by

the State. Where did that come from?

MS. HAYES: It was relied on by the State in its answer. I believe Mr. Curry submitted the affidavit separately. In the state court records, it's pages 46 to 56 and the State's answer follows so --

THE COURT: But it wasn't evidence submitted by Wardrip himself.

MS. HAYES: No, no, Your Honor.

THE COURT: Okay.

MS. HAYES: In assessing the merits of the ineffective assistance claim, a court doesn't need to address both parts of the Strickland showing. But they can certainly dispose of a claim based solely on failure of a petitioner to meet either prong. In this case, with all the evidence that's been developed through federal court, it would certainly be the most direct approach for this court to just jump straight to the prejudice prong because that would certainly be the easiest to establish and would certainly show that the Texas courts -- a determination was objectively reasonable. Here the Texas court specifically found that given the commission of Wardrip's five murders, three aggravated kidnappings, two aggravated sexual assaults and a burglary of a habitation, he failed to establish any reasonable probability that -- that he

would not have received the death penalty had counsel presented any of the unsupported allegations in state court. Now that --

THE COURT: I'm not trying to rush you, but you talk about if we consider the federal record, are you going to address Pinholster and what we should be doing with that record?

MS. HAYES: Absolutely. In looking at -- in assessing what was in front of the state courts and adjudicate the ineffective assistance claim on the merits, Pinholster instructs that the courts review is limited to the actual record that was before the state court. In this case, that record consists of the evidence that was presented at trial. So that's the testimony presented by the defense of Wardrip's former employer, Fred Duncan. It's also the testimony of the parole officer, John Diller. Those are the two witnesses presented by the defense. During the punishment phase the State introduced the penitentiary packet, which included the disciplinary records. And defense counsel was able to argue that those two records show that he only had two disciplinary offenses during the 11 years or 11 plus years in prison. So he tried to turn that into something that was mitigating.

And he also had argued that the fact that

Wardrip had confessed to these four murders showed that he was taking responsibility for his crimes. Now, that was what was in front of the jury at trial, as far as mitigating. But as far as aggravating, the State was -- Wardrip's jury was faced with, of course, the horrific facts underlying Terri Sims' murder. And this isn't the State's fallback position of the facts of the crime are so horrific that that means you can't prove prejudice. This shows in this crime, Wardrip tied the victim with an electrical cord, raped her, beat her, stabbed her repeatedly and then actually was even inflicting what they called tease wounds. Wounds that were trying to get her attention, prolong the attack and what was going on.

In the 17 months following the murder of Terry Sims and that's the murder that he is convicted for for capital murder, he also kidnapped, raped and murdered Toni Gibbs. A nurse on her way home from work at the hospital who had offered to give him a ride home. Shortly after that, he kidnapped and strangled a woman to death, Debra Taylor, who lived in Fort Worth and left her body out in a field. She was a mother of two young daughters. Wardrip then kidnapped and murdered Ellen Bilal, a woman that he abducted from a parking lot at a convenient store. Raped her, beat -- I'm sorry, the

body was so decomposed that she --

THE COURT: Counsel, we're familiar with the facts and they as you said they are horrific what we need -- what I need to know, what I think you need to explain, as does opposing counsel, is, why don't we just summarily reverse this and send it back to the district court because the district court relied on testimony taken at an evidentiary hearing by the attorney that the judge and the magistrate judge seemed to be impressed with? But under the Supreme Court, dictated under Pinholster, we are not -- district court was not allowed to buy into that that the magistrate had in his report recommendation and we are not at liberty at this point to even review that. There's no sense in reviewing it at this point because we're -- our review would be restricted to the trial court's consideration of the state record and the trial -- the district judge and the magistrate went outside of the record. So why are we here?

MS. HAYES: There's -- there are several reasons not to remand the case, that the case should stay here. And the first is that there's no need for any further factual finding. The record is as complete as the records probably ever going to get. Especially in light of the fact that trial counsel is now deceased.

He died in February of 2009.

THE COURT: But shouldn't the district court be allowed to first determine -- decide the case for the proper standard before?

MS. HAYES: Well, as I had in the letter briefing that I filed on May 31st, I pointed out the fact that the even if the case was sent back and with instructions from this court to conduct a properly limited review, the lower court created -- sort of created a legally incorrect prejudice analysis. That there's -- there doesn't look like even by sending it back and saying limit your review to what was in the state court record that it would necessarily also sua sponte, correct. It's erroneous legal reasoning. And that was instead of weighing the evidence, instead of even considering the quality and quantity of what was presented by Wardrip. The court relied on factors like the jury wasn't instructed about parole laws or the jury deliberated future dangerousness. I mean, of course they did, it was one of the special issues. Those are the factors the Court looked at in weighing the mitigating evidence, what was missing. And if this court has to send the case back and say, limit your review to what was in the state court record -- and by the way, here's how you're supposed to analyze

Strickland claims under the AEDPA. It would certainly be easier since this court already does De Novo Review, to just keep the case and issue the opinion reversing the district court.

THE COURT: We often think that's the case. We don't often do that for the institutional reasons. Well, looking at Pinholster itself, once it decided that all this extra evidence should not have been developed and shouldn't have been considered, it said we conclude Court of Appeals Circuit Court erred in considering the new evidence. Ordinarily, we would remand for a properly limited review. Of course they could've meant to the circuit court. But I think -- but because the circuit court had gone ahead and considered in the alternative, just the state court record, the Supreme Court itself did De Novo Review seems to me -- I'm not sure which way that cuts in our case, certainly Supreme Court was saying, even though their review is de novo as well normally they wouldn't do a De Novo Review. It's the business of trial court's to be doing that. Or at least lower court's.

They may have been saying the circuit court should have been doing that. But it does seem to me the direction of Pinholster, the suggestion of Pinholster, is that we ought to send this back even

though we could do a De Novo Review. Usually we are reviewing and we would review what the district court said, give a De Novo Review, but we get the guidance of the Supreme Court -- of the district court in looking at a brand new category of evidence. This limited category that the district court did not consider before. Isn't there an institutional -- you don't need to talk about institutional needs, but isn't -- aren't there procedural benefits to doing that?

MS. HAYES: Not in this case, Your Honor. Not with -- not with a case that's already over 25 years old. The case stayed in the district court for almost 11 years before they finally issued an opinion. They considered all the evidence through the federal, including the sort of hypothetical case that they believe should have been presented. When this court has the ability to just parse down that record, what was actually in front of the state court and can go ahead and issue an opinion at a judicial economy, there is certainly enough reason for this court to go ahead and do that. And routinely the court's -- I mean, granted a new rule or new law out there, but the Court routinely reverses district court's.

THE COURT: Not routinely.

THE COURT: Not routinely.

MS. HAYES: Well, when error.

THE COURT: But in this situation, there is no alternative reason for ruling offered by the district judge. I mean, we don't have any findings that we can hang our hat on and we don't make findings.

MS. HAYES: Well, if you're referring to the findings that were issued by the magistrate that they were all adopted by the district court, I mean, so those are the findings apparently in front of this court how he's reviewed the record and assessed it. And he has set it out --

THE COURT: He didn't make a finding ignoring the new evidence.

MS. HAYES: Right.

THE COURT: He considered the new evidence.

MS. HAYES: Right. And then that's all he had. I mean, because quite frankly, there is no evidence in state court. I mean, so in this kind of a record when there's nothing, it's not even a matter of let's reweigh what was in state court --

THE COURT: So you think we should strike that evidence and reverse and render?

MS. HAYES: Absolutely.

THE COURT: You have any authority for

that?

MS. HAYES: Because -- Roe versus Ortega-Flores. When the Supreme Court says that the Court needs to have a sufficient record before it when it makes its ruling and this court has a sufficient record and when reviewing it De Novo and limiting that review to the fact, there is no evidence in state court. There's certainly no way to prove that the state's court adjudication was incorrect -- was objectively unreasonable.

THE COURT: Well, let me ask you your concept of what the evidence is. And no doubt, opposing counsel tell us why we're considering the wrong approach altogether. But in support of the state habeas petition, it seems to me Wardrip had two affidavits. We have from the State, the John Curry affidavit. I guess to some extent we have the trial -- state trial court record, which is a more voluminous matter to be dealing with. What was presented so we'd have to deal with, you know, how this issue was presented of mitigation. But sort of taken out the state trial court record. Do we just have these affidavits in the state habeas records?

MS. HAYES: Yes, Your Honor. The affidavit of Larry Revel is in the state habeas record, Page 34. That was the coworker and said he went to the

same church and he kind of liked Wardrip. Thought he was -- had visions of raising his family in the community. The State can -- the Court can consider that. That's in the state court record. But it doesn't have anything to do with positive prison record claim. And neither does the affidavit of Kenneth Bishop. That's the state court record at Page 35 and he -- -

THE COURT: Weren't there other issues he was raising in the state habeas court besides mitigation? Seven claims -- seven claims of ineffective assistance. So some of this won't even relate to mitigation you're saying?

MS. HAYES: Well, it all had to do with -- like the affidavits of the coworkers and the acquaintance were offered to try to show Wardrip had transformed since the period where he had killed five women. And so that was the -- a different allegation of ineffective assistance. And then he also had the other state court claim about not presenting expert testimony to assist on future dangerousness. Those are the two experts that testified the second day of the federal hearing. And during the federal hearing counsel more thoroughly explained why he did not present those witnesses at trial.

But I mean, on the -- on the record here,

the only evidence -- like I said, there is just no evidence at all in state court. And so there's no real way I mean, once the court parses down what's properly in front of the Court after Cullen, I mean, there's nothing left. Even if the Court somehow decided that AEDPA difference or Pinholster didn't impact the case, even the Court -- even the case developed in the federal court is not likely to ever made any difference in Wardrip's sentence.

I mean, the educational and vocational records showing that he got a GED. Come on. It's evidence at trial showed that he dropped out of high school at 12th grade. Two articles where he reports prison newspaper scores -- scores from prison softball games. And then he's got inadmissible hearsay affidavits from a defense investigator and from a sister-in-law trying to verify that he, you know, behaved and did well in prison. To date, there just -- even with -- in federal court, even with the assistance of a defense investigator, there's still been no evidence presented, no admissible evidence to support many of the allegations. So after considering in light of this record, which isn't much in state court, there's certainly no reason to conclude that the state court had ever unreasonably adjudicated the Strickland claim. And

for that reason the Court should reverse and render.

THE COURT: Thank you, Ms. Hayes. You saved some time for rebuttal.

Ms. Penrose.

MS. PENROSE: Good morning.

THE COURT: Good morning.

MS. PENROSE: May it please the Court, counsel. My name is Mary Margaret Penrose and I'm here with cocounsel Bruce Anton, court appointed to represent Mr. Faryion Wardrip in this extraordinary case. I'd like to start by responding to the Cullen issues that seem very important to this court and in deed they are. I'd also like to look -- have the -- draw the Court's attention to the magistrate's opinion in this case. Because the magistrate's opinion showed an absolute unyielding amount of allegiance to the AEDPA. Throughout that opinion -- and the opinion is 64 pages. It's very cautious, it's very thoughtful and in more than in one instance, the court looks and yields to the AEDPA. Not only under Section D1, which is covered by Cullen, but also under Section D2, which the Court utilized to deny one of Mr. Wardrip's claims.

Cullen does not speak to Subsection D2 under the AEDPA. Your Honor, it asked if there was any authority for a circuit court to go ahead and decide the

facts knew, rather than remanding back down as we had suggested Cullen instructs this court to do. Actually, there are two cases I would like to draw the attention to this court. Where the Supreme Court in one case and it's Wiggins -- in the Wiggins case where Justice O'Connor writing for the majority spoke to the fact that the AEDPA does in deed limit evidentiary hearings in the consideration of materials under those evidentiary hearings. But she instructed that there are two alternatives for a court to upset state court rulings. One is under D1, where it's an unreasonable application of the law to the case. And two is when there's an unreasonable determination of the facts in light of the record. And in Wiggins, United States Supreme Court -- and I'll try and get the exact page, Your Honor, for you, is the Court said in that in Wiggins, the Court based it's conclusion in part on a clear factual error. That the social service records incidents of sexual abuse were known to the attorney. As the State and the United States now can see, the records contain no mention of sexual abuse, much less of the repeated molestation and rapes of petitioner. The state court's assumption that the records documented incidences of this abuse has been shown to be incorrect by clear and convincing evidence under ***28 USC 2254e1*** and reflects an

unreasonable determination of the facts in light of the evidence presented in the state court proceeding citing ***2254d2***.

THE COURT: Well, counsel, doesn't that just mean that if there were findings based on a particular record by the lower court, Supreme Court and this court has to determine whether those findings are legitimate? That's what Wiggins is talking about. The question from Judge Clement or at least my question was, is there any case that says if the lower court looked at the wrong record, an overly large record and we need to decide what the law is based on a narrower record.

MS. PENROSE: Correct.

THE COURT: Is there any case law that says we do that or we remand it? We're asking opposing counsel is any case that says we do that?

MS. PENROSE: Unfortunately, Your Honor, probably recognizes, I think we have found that no one has had the opportunity yet to decide this issue that Cullen has provided. In the Guidry case that this court decided in 2005, the court also spoke to the breath of evidentiary hearings. Because I want to make sure that the Court recognizes that Magistrate Stickney was proper and did not abuse his discretion in holding an evidentiary hearing. In Guidry, and that's at

397 Fed 3d 306, on Page 159, the Court says the district court's holding that the hearing was consistent with our precedent. In other words, is held by the majority opinion, district court did not abuse it's discretion. Where a district court elects an instance is not barred by ***2254e2*** as Judge Stickney found in this case to hold an evidentiary hearing.

The hearing may assist a district court and ascertain whether state court reached an unreasonable determination under either ***2254d1***, the unreasonable application of law or ***2254d2***, an unreasonable determination of the facts. When this --

THE COURT: So they can't be new facts. They have to be facts --

MS. PENROSE: Cullen doesn't speak to d2, Your Honor. The entire opinion of Cullen only speaks to the unreasonable application of the law. It doesn't say anything in Cullen about d2. It doesn't touch that particular version and this is my instinct as to why that must be so. D1 and D2 provide two different options. One is, you understood the facts and the facts are accurate, but the law that you applied you misapplied. In not only an incorrect fashion, but an unreasonable fashion.

In contrast, D2 protects Cullen from

being an absurd case. If Cullen literally meant what it says, you could never transcend the state record, then the federal court's would have to turn a blind eye to perjured testimony. If we found out an affidavit was perjured, under Cullen, in its most literal reading, you couldn't say that that was an unreasonable application of the law. Even though you find out the entire testimonial base forming the state court's opinion is false. Now, I would not suggest that Mr. Curry's testimony in this case is false, but when you look through the evidentiary hearing conducted by the federal court by Judge Stickney, you will find an affidavit that was filled with absolute material false statements. None of the testimony was based on personal knowledge.

Mr. Curry admits that information was not based on personal knowledge. Mr. Curry admits that he did not contact a single witness. That all of the investigation to which the state court bases its findings on is based on an investigator for whom he could not credit whether that investigation took place. I would like to draw the court's attention to a parallel analogy and I know it's not completely on point, but it's the best I have. In Shaffer versus Heitner, many years ago in personal jurisdiction, we may recall from law school. United States Supreme Court with Justice

Marshall writing the opinion said, from this moment forward in all cases, he used the unequivocal language in all cases, from this moment forward, we shall apply International Shoe in (inaudible) to personal jurisdiction cases. Shortly thereafter, about a decade later, Justice Scalia and the Supreme Court changed their mind in Burnham and Justice Scalia said, yes, Justice Marshall used the word all, all instances, but he didn't mean that because sometimes if we use unequivocal language it can use lead to absurd assaults.

This is an extraordinary case. I cannot imagine the court having witnessed any case where you have an individual who was sentenced for crimes that were committed many years before the trial. Where the individuals -- all the crimes were committed before this trial. Where during that interim period the person was incarcerated and only during those first two to three years during that incarceration were there any issues at all. And both were minor. One was literally yelling at someone, hey turn off the TV, no, you turn off the TV. All right. That was the first instance.

The second was a shove. And actually, Mr. Wardrip was the one that was shoved to the ground and hit his head, but he also received a disciplinary action in that case because under TDC -- TDC -- the

rules of the Texas prison, that is what occurs. Then from that point forward, this individual had not absolutely a single mark upon his prison record and that continues to this day. Yes, the crimes are horrific, but they were all in the past. This individual was on parole for roughly 18 months and he was paroled by the State of Texas four years prior to the first date that the sentencing judgment says he could be paroled. That is extraordinary. And I -- and we asked in our briefing and I would ask again today, this court take judicial notice that parole is not easily given to people who are convicted of murder in the State of Texas. It's a very rare occurrence. Any reasonable attorney would've considered that evidence, because for the first time in any case I can imagine, you don't have to predict whether someone will be a future danger.

You have an abundance of evidence. You have an entire 12-year period in prison, plus you have another period of 18 months outside of prison and those are the two aspects that Ken Bishop and Larry Revel testified to at state court. They were going directly to the issue of mitigation. Directly to the issue of future dangerousness. One of the reasons I think this court should remand the case back and permit Judge Stickney to reevaluate his findings, in light of Cullen,

perhaps now realizing that there -- Guidry provides alternative options, D1 or D2. And if Judge Stickney looks back at this testimony -- and I appreciate that Mr. Curry is now deceased, but his testimony has already been given. His testimony demonstrated the flaws. Absolute injustice in the state court's findings.

THE COURT: Ms. Penrose, let me ask you, obviously Magistrate -- Judge Stickney did not have the benefit of the new case laws, so and some of the cases you've been citing, all of them really, necessarily predate Pinholster. But it seems to me the majority in Pinholster dealt with the very problem you're talking about, that the International Shoe example, do we really mean all. Pinholster's contention that we are writing E2 out of the statute is incorrect. And then Judge Thomas goes into a few very narrow examples that you could probably recite to me, but not necessary. But he is indicating that, the court is, indicating that unless the claim falls outside of deed, meaning a claim that was not adjudicated on the merits in state court, what (inaudible) requires is that federal court's sitting in habeas not be an alternative forum for developing the evidence. And Judge Briar takes a stab at what E2 might deal with. Sotamayor disagrees with the whole approach, but it is clear as of now -- and we don't get to correct

the Supreme Court, who isn't wrong, of course, until they say they are, we're kind of, as are you, stuck with this.

MS. PENROSE: I would respectfully disagree, Your Honor. I don't find that Cullen's language identifies directly to D2. Throughout the opinion, I see it applying to D1, which is why I think the Shaffer versus Heitner, which is a quasi in rem case and then you get to Burnham, which is the traditional basis of personal jurisdiction, it's a very apt example.

Factually, I think Cullen is extraordinarily different. In this case, Judge Stickney held a hearing, very limited, even in his opinion on Page 15, he says I'm holding a limited evidentiary hearing. The State complained, we complained, we all wanted more witnesses and he shut it down. He needed to assess in the first instance whether that testimony submitted by the State, the only pillar holding up the state court's decision, Mr. Curry's affidavit, was credible. And in fact, it wasn't. It turned out to be incredible. And the United States Supreme Court in Cullen actually said that it is not overruling Schriro versus Landrigan and that's 550 US, I don't have the exact page, I apologize. But it's a 2007 case. Justice Thomas in Cullen suggests that that's completely

consistent. Well, Schriro says that in deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove to -- I'm sorry, to prove the petitions factual allegations, which if true, would entitle the applicant to federal habeas relief.

Mr. Curry, in his federal petition, and his state petition, suggested that the state attorney did not do an investigation. And meaning no disrespect to Mr. Curry, he did absolutely nothing. It's an embarrassment because this is a case where you had a wealth of mitigating information. Mr. Curry, in his state court affidavit says the best hope, this is his testimony, the best hope I have to secure a life prison for this individual, Mr. Wardrip, was to rely on the one type of evidence the State could not rebut, his exceptional record in prison. He gives, in reason, in the state court affidavit for not looking up any information about prison. There is no strategic reasons. I will, before I line down my argument, try and encourage the court that if you do take the case and review it on a De Novo basis, Mr. Wardrip should still succeed and the district court decision should not be disturbed because those state court findings are absolutely unreasonable. The affidavit that Mr. Curry

submitted --

THE COURT: How could they be unreasonable if they were not based -- if they were based on facts that weren't discovered until the federal court evidentiary hearing? How could the state court decision be unreasonable and that's all we look at? Whether it's --

MS. PENROSE: Right.

THE COURT: Whether it's right or wrong.

MS. PENROSE: I think a decision based on factual misrepresentations is inherently unreasonable. I think it would be, with all due respect, an absurd result for Cullen to say we're going to ignore false information. State's -- I'm sorry, the affidavit was incomplete. And in looking at it, it's false, but you know what, Cullen ties our hands and even though the state court has a federal independent duty to say what the law is. Marbury versus Madison commands the Article 3 Courts to do a independent evaluation under habeas corpus. It's something the constitution provides.

THE COURT: But we evaluate the state court record.

MS. PENROSE: Right. And looking at the --

THE COURT: It's not a whole other bite

of the apple.

MS. PENROSE: Absolutely. I'll agree and that -- I'll try and weed my response to what I understand is your question to complete the distinction I draw out of Cullen. Cullen truly was new evidence. It was two new affidavits of two new medical experts. Two people speaking to an issue. The evidentiary hearing in this case was simply an elimination of the unreasonable nature and the factual inaccuracy of Mr. Curry's testimony. When you read that state court affidavit it's not based on personal knowledge. There's no averment that that's true. The 5th Court Circuit demands that of affidavits. The Texas court's demand that of affidavits. There's nothing in the face of that affidavit that says it's based on personal information. Throughout the affidavit talking about any of the mitigation evidence in the investigation, Mr. Curry consistently uses the term we.

Any reasonable person -- if my parents asked a question, who broke that lamp? Well, we broke it mom. My parents wouldn't be satisfied. We, who do you mean by we? Personal knowledge, if you're saying, we did something, you have to describe who the we is and what part of the we is you. I think a reasonable court looking at Mr. Curry's affidavit would look at that

testimony and recognize that it's ambiguous at best. I do believe that was the motivation for Judge Stickney when he held this evidentiary hearing because he limited is strictly to Mr. Curry's testimony.

Judge Stickney even took the liberty during the hearing to give Mr. Curry every single benefit of the doubt. Mr. Curry, did you speak to this witness? No, Your Honor. If we failed, either the State or Mr. Anton or myself failed to properly ask a question, the judge went out of his way to give the benefit of doubt to Mr. Curry. Was there any reason you could give the court, Mr. Curry, for not looking at information and materials that you yourself say was the best hope for securing a life sentence? Mr. Curry's response, Your Honor, I didn't really make a decision one way or the other. When you look at the face of the affidavit that was submitted to the state court, there is no strategic reason, none whatsoever, that was given for not investigating Mr. Wardrip's prison record. Instead, what you have is a state court, which I'm sure this court is very familiar with how state findings are issued in Texas. The prosecutor sends over -- they're basically a version of their brief. Here's my brief, put them in the findings and many of the state court judges sign them. So then the state court should be

stuck with those findings. They wrote down that Mr. Curry had a strategic reason for relying on the state's evidence. There was no reason. He didn't say, you know what, I think I'll just sit back and see what the State has. Because the State would not have enough information that if there were errors in that information, they would only be able to be pointed out by Mr. Curry.

The State's going to say he had these two prison issues. The other record evidence that exists, the State of Texas clearly suppository of his prison time, they know he was an extraordinary inmate. They know he was paroled four years early. They know he was an exceptional parolee and during the hearings in this particular case, his parole officer said he was one of the best parolees he had ever had. There were two friends of his in the community that wanted to testify that he wasn't a threat to future danger and Mr. Curry didn't call either of those individuals. That was also elucidated in the evidentiary hearing. Turned out to be factually false. Many of the allegations that petitioner set forth in his petition, both in state and federal court, consistent with the Schriro case that I've cited to the court from the United States Supreme Court in 2007, were turned out to be factually

inaccurate.

Mr. Curry doesn't know whether his investigator Dana Rice contacted Betty Duncan or Brad Duncan, both of who, in the notes that the judge relied on, said they would've encouraged a life sentence for him. Dana Rice is medically incapacitated as our brief indicated and as Judge Stickney wrote in the findings, she also -- there are allegations and it is a fact, Mr. Curry, indicated this in his testimony that she was friends with one of the victims. She was the only investigator in this case and she was friends with one of the victims. It makes absolute sense why she didn't contact these witnesses. Brad Davis -- sorry, Brad Duncan has provided uncontroverted testimony that he was not contacted by Ms. Rice and not contacted by Mr. Curry.

So when Mr. Curry says we in that affidavit, he doesn't have personal knowledge. It's been contradicted and the State hasn't come forward with any other testimony. The same with Betty Duncan --

THE COURT: I'm sorry, you have certainly a fair amount of evidence and Judge Stickney, the district judge, also agreed with you that this new look led him to a different result. Let us assume that under Pinholster we are more limited than you are arguing on.

What we can do?

MS. PENROSE: Okay.

THE COURT: And you cannot as most of what you're saying, basically represent the evidence that would have been good to have been presented the first time to whatever kind of neglect or otherwise was not presented. It seems to me if that's the rule, that needs to be something different about this case and about what you're arguing the principal evidence, being the John Curry affidavit from ten years ago that the state court had to rely on. It seems to me that your argument in part is that that was false evidence or incomplete evidence. If it's incomplete, it seems to me we've got -- you've got a serious problem.

If it is false in some way and that falsity could not have been presented earlier you don't get another chance. I'm building my foundation for the question, I guess, you don't get another chance. It seems to me to make a better case in federal habeas. But maybe you have a chance to show that there was something false about the evidence on which the state court relied, which might be an E2 situation. I'm not sure that's apart of your argument. You're really arguing that this is D2 and Pinholster is D1, I'm not really necessarily accepting that. Is there something

unique about the falsity? And is any case law in (inaudible) that would help us decide that potentially false affidavits, if that's what Curry's affidavit was, might be treated differently.

MS. PENROSE: Your Honor, absolutely. Our position is this is false evidence. Let me be very clear about that. We believe that Mr. Curry has multiple false evidentiary statements in his affidavit that now the federal government has actual knowledge of. I don't have a case for that, Your Honor and I'm not aware that one exists. Cullen is absolutely new authority and it has certainly changed the dynamics of this case as this court require an additional briefing. It's a very new case.

Justice Briar did demonstrate though a potential exception in E2 as you indicated in the concurring opinion and I think it's because the Supreme Court would not permit an absurd assault. I could not imagine the United States Supreme Court saying appreciate what you're saying, we are not trying to put this case in a stronger evidentiary posture. We're not trying to put this case in a more formidable approach. The state attorney in this case sought an evidentiary hearing in state court. It was opposed by the state, it was denied by the court.

This attorney, the state habeas attorney sought funding to get investigator to be able to locate some of the evidence that we had the privilege of locating once we were given an investigator at the federal court level. This is a case that if we turn a blind eye -- this court has the entire record of the evidentiary hearing. There is no doubt that the affidavit that stands as the foundation of the state's court's finding is materially false.

THE COURT: Ms. Penrose, it strikes me that, you know, we're trying to grapple with this very new case, which admittedly creates a whole new set of tensions and the dynamic. That the best system is to send this case back to the district court with instructions to follow Pinholster and then that their develop -- whatever ruling comes out of that, we can look at the and if it comes back to us we will be in a much better position to deal with whether there are exactly what you can do and can't do in terms of the scope of the material that you present in a quote -- in a -- for the hearing. As I read Justice Briar's concurring opinion and Justice Aledo's concern about the narrowness of it, this is a -- really uncertain what the future course is of this is exactly the scope of it. Very clear what the court says about the evidence, but

how that's going to be applied. So I think it would be unwise for us to try to do that here and now. Let the district court look at it and you try to do -- argue with them and do the best you can in that district court. Until we have a record that grapples with a application of the Supreme Court decision and what ought to be accepted, not accepted and then in that context, we can look at it. I'm very cautious about jumping off -- for us to jump off and try to define exceptions and do more with it than that. In other words, they say vacate it or manage the district court for consideration (inaudible) and decide the case.

MS. PENROSE: Absolutely, Your Honor. Unlike the petitioner, who suggested that Judge Stickney could not be trusted or Judge Fish who ultimately decided the case at the district court level to sua sponte follow the law, I think the thoughtful opinion that was issued by the court demonstrates certainly the judge would follow the law. And it would provide the judge who made the facts and determinations to reassess it in light of this brand new case. When the court asked us for a letter briefing that was what we thought was the proper solution. To remand back to the district court and allow the district court in the first instance to make that call. So this court doesn't presuppose

factual findings that transcend the state record. It is going to be difficult for any court now reviewing this case to ignore the fact that we have a materially false affidavit. I don't know how the federal court can turn a blind eye to truth we now have. This individual was -- this individual that was convicted and sentenced to death. This is a capital case. This individual was sentenced to death and the state court refused to give him a evidentiary hearing to elucidate the falseness of the affidavit testimony of his attorney. The federal government --

THE COURT: I think we have the argument and I think you need to realize that we're not the body that's going to make this decision. So if it's, I mean, we're not rendering. If we don't render, if it's remanded --

MS. PENROSE: Right.

THE COURT: -- then you have an opportunity as Judge --

MS. PENROSE: Absolutely, Your Honor and --

THE COURT: To try to prove that it's false and to try to come within the exception that you're trying to arrive on.

MS. PENROSE: Absolutely. And I

appreciate that, Your Honor, but we do -- we would embrace the invitation of the court to remand back to the district court to allow them to decide how Cullen does impact the decision, was rendered and see if it alters any decision that was made by the court. Would the court like then to hear anything on the issue of exhaustion or any of the other issues that were briefed by the court -- asked to be briefed by the parties? Are there any other questions the court has?

THE COURT: We've read your briefs and your -- I mean, unless my colleagues have any additional questions.

THE COURT: Thank you.

MS. PENROSE: Thank you very much, Your Honor.

THE COURT: Ms. Penrose you're a great advocate and I think the district court will benefit from hearing from you.

MS. PENROSE: Thank you, Your Honor, I appreciate it.

THE COURT: And your court appointed, we certainly thank you for your service.

MS. PENROSE: Absolutely. Thank you, Your Honor.

THE COURT: But we're still open to be

convinced otherwise if you have a few points in this case.

THE COURT: That's right, if you want us to render you better convince us.

THE COURT: We hadn't ruled quite yet.

MS. HAYES: I have just a few points to address. One of the arguments was that Cullen does not actually speak to the D2 analysis. Footnote 7 in Cullen talks about -- they address Justice Sotamayor discussion that D2 doesn't include the same kind of language that they were addressing in Cullen. And the court says that the admission of that language in D2 is doesn't detract from their view, that D1 is also plainly limited to the state court record. Obviously, the language of D2 says that the facts are unreasonable in light of the evidence presented in state court. So even though Cullen is a D1 opinion, it's sort of a given that D2 would fall under the same line.

The second argument was talking about whether Cullen does prohibit evidentiary hearings. It pretty much does. It almost completely restricts it. And the court recognize that was one of the arguments by Pinholster and they addressed it saying, E2, the evidentiary hearing provision does have force, but only if -- where a claim is not barred under the E2. Like,

if the claim wasn't adjudicated on the merits in the state court, maybe a federal court has discretion. But that discretion is obviously still restricted by the E2 language.

So Cullen very clearly limits and prohibits federal court's from having hearings like happened in this court -- or in the lower court because the ineffective assistance claim was adjudicated on the merits they could not have a hearing and they could not expand the record. That's the first two big errors from the lower court. There's been an argument raised that the federal court when it had it's hearing that it was really to test the reasonableness of the attorneys affidavit. In the record page 278, 279, is the order from the district court establishing the issues for the hearing. And it just says that we're going to hear evidence from the parties on petitioners second, third and fourth grounds in which he asserts that trial counsel were ineffective for failing to present mitigating evidence at trial. Including petitioner's prison record, evidence of his life after being paroled and psychiatric evidence.

There's no indication from the record that the court's indicating that it wants to test the credibility of trial court's affidavit. And what ended

up happening is that it pretty much opened the flood gates to all the evidentiary development. And the court had encouraged the parties to submit affidavits because it said we don't want to hear from everyone, let's try to get straight to the issue. By opening the door saying lets bring in all kinds of new evidence.

There's certainly no indication they're just trying to test the reasonableness of counsel's affidavit. There's been an argument made that counsel's affidavit doesn't include -- is not based on personal knowledge and there are places in the affidavit where he refers to we. We did such and such. He was the chief public defender and the public defender's office was appointed to the case.

He had the assistance of an investigator. He had two different cocounsel at different times and also two investigators -- or two experts. A psychologist and a psychiatrist. And when in his affidavit when he refers to we, there's parts where he talks to the investigator Dana Rice and says that we conferred about such and such and decided this is what the approach was. So it's not some condemnation of his performance or it's not some falsity for him to use the term we. If anything, he was certainly being more specific to let the court know when it was something

involved from the team and not from himself, individually.

The state habeas affidavits or the fact that they've tried to complain of counsels affidavits as being false, there are only two affidavits that counsel was really addressing in state court during his affidavit. And in the affidavit of Larry Revel, counsel, John Curry, candidly admitted there's nothing in the records that show that they contacted Larry Revel or that they made -- or they sent him a letter. That he discussed it with his investigator. We believe we didn't follow up because we already had the owners of the business we had enough information about his work habits.

Regarding the affidavit of Ken Bishop, counsel specifically said you know, we did refer to, we did call Ken Bishop, we did talk to Ken Bishop. And during the federal hearing we actually pointed out in the records -- in trial court's records, the evidence, the handwritten notes showing that they did talk to this individual. I see that my time is expired. I would certainly just ask the Court not to remand this case since the record is as complete as it ever will be. Please just reverse and render the district court's decision.

THE COURT: Thank you for your argument. Court is in recess.